

No. 46459-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Ryan Schechert,

Appellant.

Kitsap County Superior Court Cause No. 13-1-01046-0

The Honorable Judge Jennifer Forbes

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
ISSUES AND ASSIGNMENTS OF ERROR.....	1
STATEMENT OF FACTS AND PRIOR PROCEEDINGS.....	3
A. After his divorce, Ryan Schechert found a new tenant for the home where he'd lived for three years with his family.	3
B. Police searched the home and found drugs in a makeup compact inscribed with the initials "K.M.M."	4
C. Defense counsel did not realize that the initials "K.M.M." were scratched into the compact, and misunderstood the foundation for his argument that Kaylee Mead owned the compact.	7
D. At trial, the state provided no evidence linking Mr. Schechert to the compact.	9
E. Over objection, the state introduced Hutchison's testimony claiming that he'd shared drugs with Mr. Schechert two weeks prior to the discovery of the compact.	10
F. The prosecutor argued to the jury that Mr. Schechert's family emergency could not qualify "as a legal defense" to bail jumping.	11
ARGUMENT.....	14

I.	Mr. Schechert was denied the effective assistance of counsel.....	14
A.	Defense counsel unreasonably failed to research law relevant to the issue of constructive possession.....	14
B.	Counsel failed to research the law relevant to “other suspect” evidence.....	16
C.	Defense counsel didn’t realize that the compact had the initials “K.M.M.” scratched into it.....	17
D.	Mr. Schechert was prejudiced by counsel’s deficient performance.	19
II.	The prosecutor committed flagrant and ill-intentioned misconduct requiring reversal of Mr. Schechert’s bail jumping conviction.....	21
A.	The prosecutor misstated the law in a manner prejudicial to Mr. Schechert.....	21
B.	Defense counsel unreasonably failed to object to prosecutorial misconduct in closing.....	23
III.	The trial judge should not have allowed Hutchison to claim that he’d shared drugs with Mr. Schechert weeks before the police searched the house.	24
	CONCLUSION	27

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Duncan v. Ornoski</i> , 528 F.3d 1222 (9th Cir. 2008)	17
<i>Foust v. Houk</i> , 655 F.3d 524 (6th Cir. 2011)	18
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	14
<i>Hodge v. Hurley</i> , 426 F.3d 368 (6 th Cir., 2005)	23
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	14, 16

WASHINGTON STATE CASES

<i>Fergen v. Sestero</i> , No. 88819-1, 2015 WL 1086516 (Wash. Mar. 12, 2015)	21
<i>In re Glasmann</i> , 175 Wn.2d 696, 286 P.3d 673 (2012)	21, 22
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010)	18, 19, 20, 24
<i>State v. Brown</i> , 113 Wn.2d 520, 782 P.2d 1013 (1989)	26
<i>State v. Callahan</i> , 77 Wn.2d 27, 459 P.2d 400 (1969)	15, 16
<i>State v. Davenport</i> , 100 Wn.2d 757, 675 P.2d 1213 (1984)	21
<i>State v. Davis</i> , ---Wn.2d---, 340 P.3d 820 (Wash. 2014)	15
<i>State v. Enlow</i> , 143 Wn. App. 463, 178 P.3d 366 (2008)	14
<i>State v. Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008)	20
<i>State v. Franklin</i> , 180 Wn.2d 371, 325 P.3d 159 (2014)	16
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996)	19

<i>State v. Jones</i> , 144 Wn. App. 284, 183 P.3d 307 (2008)	21
<i>State v. Kilgore</i> , 147 Wn.2d 288, 53 P.3d 974 (2002)	25
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	16, 17
<i>State v. Maupin</i> , 128 Wn.2d 918, 913 P.2d 808 (1996).....	17
<i>State v. Pam</i> , 98 Wn.2d 748, 659 P.2d 454 (1983).....	26
<i>State v. Pogue</i> , 104 Wn. App. 981, 17 P.3d 1272 (2001)	26
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	19, 20
<i>State v. Slocum</i> , 183 Wn. App. 438, 333 P.3d 541 (2014)	25, 26, 27
<i>State v. Thang</i> , 145 Wn.2d 630, 41 P.3d 1159 (2002).....	25

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI	1, 14, 20, 24
U.S. Const. Amend. XIV	1, 2, 14, 20, 24

OTHER AUTHORITIES

ER 401	15
ER 402	15
ER 403	26
ER 404	25, 26
ER 609	26

ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Schechert was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Defense counsel failed to properly present evidence undermining the state's proof of constructive possession.
3. Defense counsel unreasonably failed to research the relevant law.
4. Defense counsel was ineffective for failing to examine the evidence closely.

ISSUE 1: Was Mr. Schechert prejudiced by his attorney's unreasonable failure to research the law?

ISSUE 2: Was Mr. Schechert prejudiced by his attorney's unreasonable failure to examine the state's evidence?

ISSUE 3: Was Mr. Schechert denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

5. Defense counsel provided ineffective assistance by failing to object to prosecutorial misconduct.

ISSUE 4: Should counsel have objected when the prosecutor improperly argued that Mr. Schechert's family emergency didn't "qualify as a legal defense" to bail jumping?

6. Prosecutorial misconduct deprived Mr. Schechert of his due process right to a fair trial.
7. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by asking jurors to find that Mr. Schechert's family emergency didn't "qualify as a legal defense" to bail jumping.
8. The prosecutor improperly mischaracterized the law, in light of the trial judge's decision to admit evidence of and instruct the jury on the "uncontrollable circumstances" defense to bail jumping.

ISSUE 5: Must the bail jumping conviction be reversed because of the prosecutor's effort to mislead the jury regarding the applicable law?

ISSUE 6: Did the prosecutor commit misconduct that infringed Mr. Schechert's Fourteenth Amendment right to due process?

9. The court erred by admitting Hutchison's testimony that he'd shared methamphetamine with Mr. Schechert two weeks prior to the search.
10. The court erred by admitting evidence of uncharged misconduct without evaluating Hutchison's credibility.
11. The court erred by admitting evidence of prior misconduct without finding by a preponderance that the misconduct occurred.
12. The court erred by failing to explicitly balance the probative value of the prior misconduct against the danger of unfair prejudice.

ISSUE 7: Should the trial court have excluded Hutchison's testimony claiming he'd shared methamphetamine with Mr. Schechert two weeks prior to the charged crime?

ISSUE 8: Did the trial judge err by failing to explicitly evaluate Hutchison's credibility and find by a preponderance that his account of shared methamphetamine use was true?

ISSUE 9: Must Mr. Schechert's convictions be reversed because the trial judge failed to explicitly balance the probative value of the prior misconduct evidence against the danger of unfair prejudice?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

- A. After his divorce, Ryan Schechert found a new tenant for the home where he'd lived for three years with his family.

For three years, Mr. Schechert raised hogs at his home, where he lived with his wife and son and his two Chiweenies¹ ("Sammy" and "Lalani.") RP² 307-309, 471. Following a divorce in May of 2013, he began cleaning up the property in preparation for a move.³ 270, RP 307-308. He found a new tenant and filled out Section 8 paperwork while working to ensure the property was up to code. RP 307-308.

At that time, the new tenant "was already needing a place to stay." RP 271, 307-308. Because of this, Mr. Schechert slept "[a] couple nights a week" in a recliner in the front room while he continued cleaning the property, and spent the rest of his time elsewhere. Ex. 15, Supp. CP; RP 270-271, 307-308.⁴ He had emptied most of the house of its furniture. RP 149-151.

¹ A "Chiweenie" is a cross between a Chihuahua and a Dachsund. RP 271.

² Most of the Report of Proceedings is sequentially numbered, and will be referred to simply as "RP." The hearing from May 12, 2014 reported by Court Reporter Andrea Ramirez will be cited as RP (Ramirez) to distinguish it from the other hearing held that same day.

³ He also faced the prospect of a fine from the county, having misunderstood some aspect of the county ordinance applicable to hog farming. RP 307-308.

⁴ The record does not make clear whether Mr. Schechert was moving in with his grandmother (where he lived at the time of sentencing), with his parents (who were taking care of his son at that time), or elsewhere. RP 471.

During this transitional period, the master bedroom—aka the “orange” bedroom—was “more or less a storage for the current occupant.” RP 271. The orange bedroom no longer had a bed in it. It was messy and much more cluttered than the living room, the kitchen, or the “blue” bedroom. RP 192, 376; *compare* Ex. 17, 25 *with* Ex. 15, 16, 24, Supp. CP. Mr. Schechert still had some of his belongings at the house, and he also allowed his friends—both men and women—to store things in the house. RP 271, 310.

Even when Mr. Schechert wasn’t home, there were usually others at the house. RP 234; 383. His visitors included both men and women.⁵ RP 234, 271. Mr. Schechert also took care of a friend’s dog (a pitbull mix named “Pig”) until it injured one of his Chiweenies. RP 311. When the dog visited, Mr. Schechert kept it in the orange bedroom. RP 310-312.

B. Police searched the home and found drugs in a makeup compact inscribed with the initials “K.M.M.”

One morning in June, Mr. Schechert arrived at the house, planning to work on the property. Shortly after his arrival, police officers came to search the house.⁶ 270-271, 307-308. They found a man named Chris

⁵ The prosecutor intimated at one point that the residence was a “drug house,” where addicts came to use controlled substances. RP 294-301.

⁶ The officers had a search warrant. RP 44. The warrant and associated documents are not part of the record.

Hutchison out in the driveway. RP 147, 193; 232. The dog Pig was not present.⁷ RP 366; Stipulation, Supp. CP.

Hutchison had methamphetamine in his car. RP 384. He was arrested and charged with possession. He later pled guilty to a misdemeanor, and agreed to testify against Mr. Schechert. RP 384-385, 390-391.

Although the police searched the whole house, they found nothing except a small gold makeup compact containing methamphetamine. 178-176; 214-216. They found the compact among the clutter of the “orange” bedroom. *See* Ex. 17-19, Supp. CP. The compact was closed when discovered; it hinged open to reveal a mirror on the top surface and the methamphetamine. Ex. 17, 18, 19, Supp. CP. The officers did not look for fingerprints on the compact.⁸ RP 187.

The compact had the initials “K.M.M.” scratched into it. Ex. 18. Mr. Schechert believed the compact belonged to a woman named Kaylee Mead. She had previously admitted to using methamphetamine at the house.⁹ RP (Ramirez) 19, RP 73-74, 470.

⁷ Although one officer thought he remembered a dog, the parties stipulated that the dog was not there when the police came. RP 167-168; 366; Stipulation, Supp. CP.

⁸ One officer described the surface of the compact as “a rough surface with lots of texture to it.” RP 188. The outside of the compact is shown in Ex. 17, Supp. CP.

⁹ It is not clear from the record whether or not Kaylee Mead was his new tenant. RP 307-308. Mead’s prior statement was that she had used methamphetamine with Mr. Schechert at the house. RP 74.

The compact sat on a wooden table, surrounded by other objects including a can of styling mousse called “Bed Head Foxy Curls.” Ex. 17, Supp. CP.¹⁰ Other objects on the table included makeup (lipstick, glitter, and several makeup brushes), a scotch tape dispenser, three key rings (including car keys), electrical tape, a magnifying glass, a Bausch and Lomb reading magnifier (“for reading lines of small type and numerals,” according to the packaging), a metal file and other tools, a flashlight, zippo lighter fluid, Top brand rolling papers, two pairs of scissors, a dark-colored duffle bag, a regular magnifying glass, and a woman’s watch. Ex. 17, 18, 19, Supp. CP; *see also* RP 434. The police apparently did not attempt to find fingerprints on any of these objects. *See* RP *generally*.

On another table surface, attached at right angles to the table where the compact was found, police found Mr. Schechert’s wallet.¹¹ Ex. 20, 21; Supp. CP. This table surface also supported an iron, a spray can of Niagara starch, a sharpie, a flat carpenter’s pencil, a bowl containing a utility knife, a black over-the-door bracket of coat hooks, and a black bag containing

¹⁰ Mr. Schechert’s driver’s license does not show him as having curls of any sort. See Ex. 21, Supp. CP.

¹¹ The police apparently moved the wallet from where they found it. They opened it so as to display Mr. Schechert’s driver’s license. RP 190, 312; Ex. 20, 21, Supp. CP.

pliers and papers (including a recent traffic ticket).¹² RP 175, 312, 374-378, 381; *see also* Ex. 20, 21, Supp. CP.

The orange bedroom also contained clothes. Some of these rested on a makeshift table, the base of which consisted of plastic storage containers filled with “personal items.” RP 312, 374-378, 381; Ex. 22, Supp. CP. The table had been set up beneath a hand-made wooden sign reading “Schechert.” Ex. 22, 23, Supp. CP. No contraband was found in this area. *See* RP *generally*.

The state charged Mr. Schechert with possession of methamphetamine, and later added one count of bail jumping. CP 22-24.

C. Defense counsel did not realize that the initials “K.M.M.” were scratched into the compact, and misunderstood the foundation for his argument that Kaylee Mead owned the compact.

Mr. Schechert planned to present an unwitting possession defense at trial. RP (Ramirez) 20. He believed the makeup compact belonged to a woman named Kaylee Mead. RP (Ramirez) 19; RP 73-74, 470. He wished to present testimony connecting her to the compact.

Prior to trial, the state moved to limit any evidence of unwitting possession that rested on evidence that the drugs belonged to someone else. CP 3, 8-18. The prosecutor argued that such evidence was

¹² The parties disputed where the wallet and ticket were located before the police moved items around during their search. RP 312, 433.

inadmissible unless the court found that the evidence “precludes the possibility of the Defendant’s simultaneous possession.” CP 15.

Defense counsel did not file a responsive pleading. Instead, counsel conceded that limitations on “other suspect” evidence applied. RP (Ramirez) 17-19. Specifically, counsel agreed that the evidence of Kaylee Mead’s ownership could not be introduced without prior court approval, and that such evidence was inadmissible unless it showed that the drugs belonged to Mead “to the exclusion of the Defendant...” RP 17-18, 19.

The parties entered an agreed Order *in Limine* which included the following language: “No reference to ‘other suspect’ evidence may be made without prior finding by the trial court that the other suspect evidence is established by proper foundation.” CP 20; *see* RP 19, 21.

The parties discussed Kaylee Mead on several occasions. RP (Ramirez) 19, RP 73-74, 470. Each time, defense counsel pointed to Kaylee Mead’s admission that she’d used methamphetamine in the house. RP (Ramirez) 19, RP 73-74, 470. However, counsel never told the court that the makeup compact had the initials “K.M.M.” scratched into it. *See* RP *generally*. Furthermore, counsel never sought a final ruling allowing evidence that the compact belonged to Kaylee Mead. *See* RP *generally*.

In the end, the jury never heard the name Kaylee Mead. *See RP generally.* Nor did counsel ever point out to the jury that the compact had the initials “K.M.M.” scratched into it. *See RP generally.*

D. At trial, the state provided no evidence linking Mr. Schechert to the compact.

To establish possession, the state relied on Mr. Schechert’s presence at the time of the search, his ownership of the premises, and the fact that police found his wallet and documents belonging to him in the same room as the gold compact. RP 112-248, 327-395, 411-428, 442-448. The state did not produce fingerprint or other forensic evidence tying him to the compact. *See RP generally.* Nor did the state prove any connection between Mr. Schechert and the initials “K.M.M.” carved into the compact. Ex. 18, 19, Supp. CP.

The state also provided no evidence linking Mr. Schechert to the other objects found near the compact. Specifically, the prosecution presented no evidence that his fingerprints were on any of these objects. *See RP generally.* The prosecutor did not claim that Mr. Schechert was visually impaired, so as to require the magnifier found next to the compact or the other magnifying glass on the table. Ex. 17, 18, 19, Supp. CP; *see RP generally.*

The state did not prove that Mr. Schechert owned the car keys found on the table, or that the other keys opened property belonging to him. Ex. 17, 18, 19, Supp. CP; *see* RP *generally*. The state made no effort to explain the close proximity of the makeup, the makeup-related implements, or the “Foxy Curls” styling mousse shown in the photographic exhibits. Ex. 17, 18, 19, Supp. CP; *see* RP *generally*.

- E. Over objection, the state introduced Hutchison’s testimony claiming that he’d shared drugs with Mr. Schechert two weeks prior to the discovery of the compact.

Mr. Schechert denied ownership of the compact. He testified at trial that he had never seen it, did not know it contained methamphetamine, and didn’t know it was in the orange bedroom. RP 271, 312. He did not claim that he’d never used drugs, or that he couldn’t identify methamphetamine; instead, he focused his defense on his unfamiliarity with the compact. RP 271, 312.

Over Mr. Schechert’s objection, the court allowed Chris Hutchison to testify that he’d been at the house two weeks prior to the search.¹³ CP 30-34; RP 44-53, 219-229, 337-348, 386-388. Although Hutchison admitted he didn’t know Mr. Schechert well, he claimed that Mr.

¹³ Although charged with felony possession, Hutchison pled guilty to a misdemeanor and agreed to testify against Mr. Schechert. RP 385. His agreement to testify was not formalized in a written plea agreement, and there was no mention of it on his plea form. RP 390-391.

Schechert had produced a pipe, and the two of them had smoked meth together. RP 229-231, 386.

Hutchison did not mention the gold compact. RP 229-234, 382-395. Instead, he testified that Mr. Schechert went to one of the back bedrooms—not necessarily the orange bedroom—and returned with the pipe and methamphetamine. RP 387, 393-395. The police did not find a pipe or any other paraphernalia during their search of the entire house. RP 214-216. Mr. Schechert denied using drugs with Hutchison.¹⁴ RP 395.

F. The prosecutor argued to the jury that Mr. Schechert’s family emergency could not qualify “as a legal defense” to bail jumping.

Mr. Schechert’s case had been set for court on February 10, 2014 at 9:00 a.m. At that time, he lived with his father’s cousin, Craig Schechert.¹⁵ RP 32, 35, 272.

At 8:00 on the morning of February 10th, Craig came to him while he was still in bed. RP 36, 276. Craig had just learned that his 84-year-old father, Clyde Schechert,¹⁶ was being discharged from a nursing home. RP 276. Craig “was in a panic state;” he believed his father, who was

¹⁴ He did not claim that he’d never used drugs. RP 395.

¹⁵ Craig Schechert will be referred to as “Craig,” to avoid confusion. No disrespect is intended.

¹⁶ Clyde Schechert will be referred to as “Clyde,” to avoid confusion. No disrespect is intended.

recovering from triple bypass surgery, wasn't yet well enough to come home. RP 34, 276, 278.

Clyde had open wounds from the surgery. RP 273. He couldn't walk and could barely talk. RP 273. He was prohibited from sitting up on his own,¹⁷ and needed to have his bandages changed every two to four hours. RP 34, 281.

Craig asked for help preparing the home for Clyde's arrival. Mr. Schechert helped clean and prepare the house. RP 36. Craig also asked Mr. Schechert to stay home with Clyde while he (Craig) picked up paperwork from the doctor's office and filled his prescriptions. RP 34. Craig's sisters lived out of town, and he had no one else he could ask on such short notice. RP 35.

Craig left Clyde in Mr. Schechert's care from around 9:00 a.m. until around 2:30 p.m. RP 35-36. During that time, Mr. Schechert helped Clyde go to the bathroom, prepared him meals, and generally provided care. RP 36. At one point, Clyde ripped out his own IV and bled all over the kitchen. RP 274. Mr. Schechert, who is not a caregiver, found the ordeal overwhelming. RP 274. Nevertheless, he continued providing care for the next few days. RP 282.

¹⁷ The day before his release, he'd passed out while walking with a walker. RP 34.

Because he'd missed court, Mr. Schechert called his attorney on February 11th, the morning after Clyde's discharge from the nursing home. RP 274, 302, 314. This is what the clerk's office instructs defendants to do after a missed court date. RP 130. His attorney followed the procedure used in Kitsap County: he scheduled the case for the next available calendar. RP 130, 282. Mr. Schechert appeared in court and the judge had him taken into custody.¹⁸ RP 128-129, 274, 306.

At Mr. Schechert's request, the court instructed the jury on the "uncontrollable circumstances" defense. CP 54. In closing argument, the prosecutor tasked the jury with deciding whether or not Mr. Schechert's family emergency "even qualifies as a legal defense to a bail jumping charge." RP 413.

Later in her argument, the prosecutor answered her own question:

I ask you find even if all those things true -- it doesn't qualify as a legal defense. There's certain things we're willing to recognize. This doesn't fall into any of those categories.
RP 419.

¹⁸ Although he told his attorney about his sick uncle, the attorney told the court that Mr. Schechert had made an honest mistake and had the wrong date. RP 304-305, 306, 314. Counsel (apparently anticipating a bail jumping charge) told Mr. Schechert that information about his uncle would be a defense at trial. RP 314-315. When asked about his attorney's statement to the court, Mr. Schechert explained that the court would not let him speak since he was represented. RP 306. This happened at least one other time in the proceedings. *See* RP 5.

The jury convicted Mr. Schechert of bail jumping and possession of methamphetamine. CP 57. Following sentencing, he timely appealed. CP 70-82.

ARGUMENT

I. MR. SCHECHERT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.¹⁹

A conviction must be reversed for ineffective assistance if counsel's deficient performance at trial prejudiced the accused person. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Mr. Schechert's possession conviction must be reversed because his attorney failed to adequately investigate his case, failed to research the relevant law, and failed to object to prosecutorial misconduct.

A. Defense counsel unreasonably failed to research law relevant to the issue of constructive possession.

Constructive possession "is the exercise of dominion and control over an item." *State v. Enlow*, 143 Wn. App. 463, 468, 178 P.3d 366 (2008). Here, the state bore the burden of proving that Mr. Schechter constructively possessed the methamphetamine found in the gold compact located in the orange bedroom.

¹⁹ The Sixth Amendment right to the effective assistance of counsel is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. VI and XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Constructive possession is established “by viewing the totality of the circumstances.” *Id.* Accordingly, any factor bearing on constructive possession was relevant and admissible at Mr. Schechert’s trial. *See* ER 401, ER 402.

One factor relating to constructive possession is “ownership of the item.” *State v. Davis*, ---Wn.2d---, ___, 340 P.3d 820, 827 (Wash. 2014). In drug possession cases, “[c]onsideration must be given to the ownership of the drugs as ownership can carry with it the right of dominion and control.” *State v. Callahan*, 77 Wn.2d 27, 31, 459 P.2d 400 (1969).

Here, ownership of the compact (and the drugs it contained) bore directly on the element of constructive possession. *Id.* Any evidence tending to show ownership was thus highly relevant. *Id.*

The affirmative defense of unwitting possession does not relieve the state of proving constructive possession. *Id.*, at 31-32. The rule requiring the defendant to show unwitting possession “cannot be used to furnish the element which the state must first prove, namely, that the defendant was in possession of the proscribed goods.” *Id.*, at 32.

The prosecutor’s position, accepted by the judge and by defense counsel, undermines this basic premise. The jury was entitled to consider who owned the drugs when deciding whether or not Mr. Schechert constructively possessed them. *Id.*

The conduct of a reasonable attorney “includes carrying out the duty to research the relevant law.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Here, defense counsel failed to research the applicable law, as evidenced by his unwarranted concession that the limitations on “other suspect” evidence applied to this case. RP 74.

Defense counsel should have realized that evidence of ownership is relevant to the state’s burden of proving constructive possession. *Callahan*, 77 Wn.2d at 31-32. Nothing prevents a prosecutor from showing that a defendant owns drugs constructively possessed; likewise, nothing should prevent the defendant from showing that someone else owns the drugs. *Id.* Ownership is a factor bearing on constructive possession. *Id.*

Defense counsel’s failure to research applicable law was objectively unreasonable. Counsel provided deficient performance under *Strickland*.

B. Counsel failed to research the law relevant to “other suspect” evidence.

Even if the state was correct that limitations on “other suspect” evidence applied here, the prosecutor overstated those limitations. A defendant may present other suspect evidence whenever there is evidence “tending to connect someone other than the defendant with the crime...” *State v. Franklin*, 180 Wn.2d 371, 381, 325 P.3d 159 (2014) (internal quotation marks and citations omitted). The law does not require the

evidence to exclude the defendant as the perpetrator. *See, e.g., State v. Maupin*, 128 Wn.2d 918, 913 P.2d 808 (1996). In *Maupin*, the Supreme Court reversed a conviction based on the exclusion of other suspect evidence, even though the testimony “would not necessarily have exculpated [the defendant], as he may have been acting in concert with the [other suspects].” *Id.*

Had counsel researched the law relating to “other suspect” evidence before going into court, he would not have agreed with the prosecutor’s position, reflected in the court’s statements on the subject. Armed with a proper understanding of the law, counsel could have pursued his theory that Kaylee Mead owned the gold compact and the drugs found within it. *Id.*

Defense counsel should have researched the applicable law. *Kyllo*, 166 Wn.2d at 862. His failure to do so fell below an objective standard of reasonableness. *Id.*

C. Defense counsel didn’t realize that the compact had the initials “K.M.M.” scratched into it.

To be effective, defense counsel must undertake a reasonable investigation (or make a reasonable decision that particular investigations are unnecessary). *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008). Here, defense counsel failed to undertake a reasonable investigation.

Although counsel hoped to persuade the judge to allow evidence that Kaylee Mead owned the gold compact, he never once told the judge that the compact had the initials “K.M.M.” scratched into it. *See RP generally*. In his arguments, he repeatedly mentioned Kaylee Mead’s admission (that she’d used methamphetamine at the house) but never referenced the evidence on the compact itself.

Counsel had planned to show the jury that Kaylee Mead owned the compact and the drugs. Despite this, he did not point out the initials to the jury, and failed to elicit any evidence even mentioning Kaylee Mead’s name, much less her connection to the house and the compact. *See RP generally*.

Had counsel examined the compact or looked at the photographic exhibits, he would have seen the initials “K.M.M.” scratched into the compact’s gold surface. Ex. 18, 19, Supp. CP. This would have been strong support for his theory that Kaylee Mead owned the compact and the drugs inside.

Strategic choices made after less-than-complete investigation are unreasonable unless professional judgment supports the limitations on investigation. *Foust v. Houk*, 655 F.3d 524, 538 (6th Cir. 2011); *see also State v. A.N.J.*, 168 Wn.2d 91, 111-112, 225 P.3d 956 (2010). Here, having failed to notice the initials carved into the compact, counsel was in no position to properly represent Mr. Schechert at trial. *A.N.J.*, 168 Wn.2d at 111-112.

Counsel's failure to closely examine the exhibits constituted deficient performance. *Id.*

D. Mr. Schechert was prejudiced by counsel's deficient performance.

Counsel's failure to properly investigate (by closely examining the state's exhibits) and to research the applicable law "fell below an objective standard of reasonableness." *A.N.J.*, 168 Wn.2d at 109. There is a reasonable possibility that the verdict might have been more favorable absent counsel's errors. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

The presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance.²⁰ *Reichenbach*, 153 Wn.2d at 130. Nothing can justify counsel's failure to familiarize himself with the facts and to research the law.

Had counsel done so, he would have been able to present evidence to the jury suggesting that Kaylee Mead owned the compact. As a result, some jurors would likely have had a reasonable doubt that Mr. Schechert constructively possessed the methamphetamine. By pointing out the initials "K.M.M." scratched into the compact and presenting evidence linking Kaylee

²⁰ Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record."). Nothing in the record shows that counsel's strategy somehow involved remaining ignorant of the facts and the law.

Mead to the residence, counsel might well have obtained an acquittal for his client.

No legitimate strategy supported counsel's failure to pursue the Kaylee Mead theory. Mead had not been located by either party prior to trial, and thus was not available to rebut the evidence that the compact belonged to her. RP (Ramirez) 22. Nor could the state have introduced her out-of-court statement to police (that she'd used meth with Mr. Schechert). *See, e.g., State v. Flores*, 164 Wn.2d 1, 18, 186 P.3d 1038 (2008).

Furthermore, proving that Kaylee Mead owned the compact would have been consistent with counsel's more general strategy of showing that others visited the house and had access to the back room. There is a reasonable likelihood that the outcome of trial would have differed had counsel thoroughly examined the evidence and researched the applicable law. *Reichenbach*, 153 Wn.2d at 130.

Mr. Schechert was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *A.N.J.*, 168 Wn.2d at 111-112. His conviction must be reversed and the case remanded for a new trial. *A.N.J.*, 168 Wn.2d 91.

II. THE PROSECUTOR COMMITTED FLAGRANT AND ILL-INTENTIONED MISCONDUCT REQUIRING REVERSAL OF MR. SCHECHERT’S BAIL JUMPING CONVICTION.²¹

- A. The prosecutor misstated the law in a manner prejudicial to Mr. Schechert.

A prosecutor’s misstatement regarding the law is “a serious irregularity having the grave potential to mislead the jury.” *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Here, the prosecutor committed misconduct by urging jurors to decide as a matter of law that Mr. Schechert’s family emergency could not qualify as “uncontrollable circumstances” excusing his failure to attend court. RP 413, 419.

The court, not the jury, decides whether a litigant has produced enough evidence to warrant an instruction. *Fergen v. Sestero*, No. 88819-1, 2015 WL 1086516, at *7 (Wash. Mar. 12, 2015). Here, the court found that Mr. Schechert had met the threshold to raise the “uncontrollable circumstances” defense. The judge allowed Mr. Schechert’s testimony on the subject (over the prosecutor’s objection) and instructed the jury on the defense. RP (Ramirez) 34; RP 9, 38-39, 55-57, 59-60, 273-282; CP 54.

²¹ Absent an objection, a court can consider prosecutorial misconduct for the first time on appeal, and must reverse if the misconduct was flagrant and ill-intentioned. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). A reviewing court analyzes the prosecutor’s statements during closing in the context of the case as a whole. *State v. Jones*, 144 Wn. App. 284, 291, 183 P.3d 307 (2008).

In light of the judge's decision to allow the evidence and to instruct the jury on the defense, the prosecutor should not have argued that the family emergency didn't qualify "as a legal defense." RP 413, 419. The prosecutor was free to argue that Mr. Schechert should not be believed,²² and that the *facts* didn't support an acquittal under the defense. However, by telling jurors that the facts didn't "qualify as a legal defense," the prosecutor improperly suggested that the law could not support the defense arguments. RP 413, 419.

The judge had already ruled on the matter. Under the judge's ruling, Mr. Schechert's argument could support an acquittal. Otherwise, the judge would have excluded the evidence (following the offer of proof) and refused to instruct the jury on the defense. The prosecutor overstepped the bounds of advocacy by arguing that Mr. Schechert's family emergency couldn't qualify "as a legal defense." RP 413, 419.

Misconduct requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *Glasmann*, 175 Wn.2d at 704. Here, the prosecutor's improper argument prejudiced Mr. Schechert.

A prosecutor's closing argument is likely to have significant persuasive effect on a jury. *Glasmann*, 175 Wn.2d at 706. Jurors will

²² The prosecutor did, in fact, make this argument. RP 414-419.

often give special weight to the prosecutor's arguments. *Id.* Because of "the prestige associated with the prosecutor's office,"²³ some jurors may well believe that prosecutors have a better understanding of the law than defense attorneys.

In light of this, there is a substantial likelihood that the misconduct affected the jury's verdict on the bail jumping charge. *Id.* The conviction must be reversed and the charge remanded for a new trial. *Id.*

B. Defense counsel unreasonably failed to object to prosecutorial misconduct in closing.

Defense counsel should have objected when the prosecutor argued that Mr. Schechert's family emergency did not "qualify as a legal defense" to bail jumping. RP 413, 419. Counsel's failure to object prejudiced Mr. Schechert, because the prosecutor's improper argument left jurors with the impression that they could not acquit on the bail jumping charge as a matter of law.

Failure to object to improper closing arguments is objectively unreasonable under most circumstances: "At a minimum, an attorney... should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection." *Hodge v. Hurley*, 426 F.3d 368, 386 (6th Cir., 2005). Defense counsel did not even take this minimum step. RP 413, 419.

²³ *Id.*, internal quotation marks and citations omitted.

Counsel's failure to object cannot be characterized as a tactical decision. The defense gained no benefit from allowing the prosecution to misrepresent the law in a manner unfavorable to Mr. Schechert. At a minimum, the lawyer should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.* Defense counsel did neither.

Counsel's deficient performance prejudiced Mr. Schechert. The prosecutor's misconduct went directly to Mr. Schechert's defense to the bail jumping charge. There is a reasonable likelihood that some jurors voted to convict because they believed the prosecutor's misrepresentations about the law.

Counsel's failure to object deprived Mr. Schechert of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *A.N.J.*, 168 Wn.2d at 111-112. His conviction must be reversed and the case remanded for a new trial. *A.N.J.*, 168 Wn.2d 91.

III. THE TRIAL JUDGE SHOULD NOT HAVE ALLOWED HUTCHISON TO CLAIM THAT HE'D SHARED DRUGS WITH MR. SCHECHERT WEEKS BEFORE THE POLICE SEARCHED THE HOUSE.

Mr. Schechert testified that he'd never seen the compact, didn't know it was in the orange bedroom, and didn't know it contained methamphetamine. RP 271. He never denied prior drug use, or claimed that he couldn't identify methamphetamine. RP 270-325.

The court initially rejected the state’s proffered evidence of prior drug use. The court ruled that the evidence would only be admitted if it was part of the *res gestae*—that is, that the prior use was close in time and place to the discovery of the compact. RP 15, 219-223. However, later in the proceedings, over Mr. Schechert’s strenuous and repeated objections, the court allowed Hutchison to testify that he’d shared methamphetamine with Mr. Schechert two weeks before police found the compact. RP (Ramirez) 4-5, 9-11. The court did not adequately analyze this evidence, and should not have admitted it at trial.

Before admitting evidence of prior misconduct under ER 404(b), the court must go through a four-step procedure on the record.²⁴ *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014). The court did not go through the steps on the record.

The court must find by a preponderance that the misconduct actually occurred. *Id.* This may require the court to assess the credibility of the witness who will testify. *See State v. Kilgore*, 147 Wn.2d 288, 295, 53 P.3d 974 (2002) (“there may be instances where the trial court cannot make the decision it must make based simply on an offer of proof.”). In

²⁴ Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

this case, the court did not examine Hutchison's credibility, and did not make a finding by a preponderance that the misconduct actually occurred.

The court must also explicitly weigh the probative value of the evidence against the danger of unfair prejudice.²⁵ *Id.* The court did not take this step on the record.

The improper admission of evidence under ER 404(b) requires reversal if there is a reasonable probability that it affected the outcome of the trial. *Slocum*, 183 Wn. App. at 456. Where the prior acts are similar to the charged crime, the potential for prejudice is magnified. *See State v. Pam*, 98 Wn.2d 748, 760, 659 P.2d 454 (1983) (Utter, J., concurring) (addressing ER 609), *overruled on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989). Here, there is a reasonable probability that the improperly admitted evidence affected the outcome of trial.

Hutchison claimed that Mr. Schechert had previously committed the very same crime with which he was charged. It is highly likely that jurors considered the evidence as proof that Mr. Schechert was a regular methamphetamine user, and thus had a propensity to possess methamphetamine. *See, e.g., State v. Pogue*, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001).

²⁵ The court applies the standards developed for analysis of questions under ER 403.

The trial court should not have admitted the evidence without explicitly finding by a preponderance that Hutchison was telling the truth, and without evaluating (on the record) the impact the evidence would have on the jury's verdict. *Slocum*, 183 Wn. App. at 448. Mr. Schechert's convictions must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

Mr. Schechert's convictions must be reversed.

First, defense counsel's deficient performance prejudiced Mr. Schechert. Counsel should have familiarized himself with the law and the evidence. His failure to do so adversely affected the verdict on the possession charge.

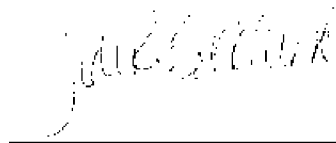
Second, the prosecutor committed misconduct by misrepresenting the law to the jury. The misconduct was flagrant and ill-intentioned, and requires reversal of the bail jumping charge.

Third, the court erred by admitting testimony that Hutchison had previously shared drugs with Mr. Schechert. The court didn't evaluate Hutchison's credibility and find by a preponderance that the misconduct occurred. Nor did the court explicitly balance the probative value of the evidence against the danger of unfair prejudice. The improper admission of the evidence requires reversal of both charges.

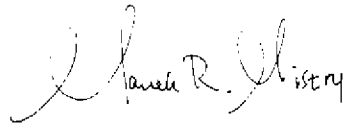
This court should reverse the convictions. The case must be remanded for a new trial.

Respectfully submitted on March 27, 2015,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Ryan Schechert
20487 Ammon Lane
Poulsbo, WA 98370

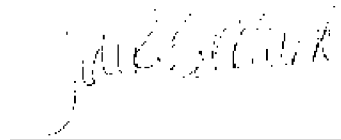
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney
kcpa@co.kitsap.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 27, 2015.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

March 27, 2015 - 11:58 AM

Transmittal Letter

Document Uploaded: 5-464594-Appellant's Brief.pdf

Case Name: State v. Ryan Schechert

Court of Appeals Case Number: 46459-4

Is this a Personal Restraint Petition? Yes ☐ No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

kcpa@co.kitsap.wa.us